UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

BLACK AGENTS & BROKERS AGENCY INC., Milton Ward, Melvin Ward and Roosevelt Haywood, Sr., in their capacity as shareholders and officers of BABA, INC.,	)	
Plaintiffs,	)	
v.	)	Cause No. 2:01 CV 419 PS
NEAR NORTH INSURANCE BROKERAGE, INC., MAJESTIC STAR CASINO, L.L.C., TRUMP INDIANA, INC., and BUFFINGTON HARBOR CASINOS,	)	
Defendants.	)	

ORDER

This matter is before the Court on the motions for summary judgment filed separately by Defendant Near North Insurance Brokerage, Inc. (Docket No. 39) and Defendants Majestic Star Casino, L.L.C., Trump Indiana, Inc., and Buffington Harbor. (Docket No. 45). Defendants Majestic Star, Trump and Buffington Harbor have also simultaneously moved for Partial Judgment on the Pleadings (Docket No. 48). This case arises from an agreement between Near North Insurance Brokerage and Black Agents & Brokers Agency to assist in the brokerage of insurance policies sold to Trump, Majestic Star and Buffington Harbor from 1996-2003. Plaintiffs Black Agents & Brokers Agency, Milton Ward, Melvin Ward and Roosevelt Haywood, Sr. have brought claims under 42 U.S.C. § 1981 as well as state law breach of contract and fraud claims based upon the termination of this agreement.[1] Because there is no

[1] The Court exercises jurisdiction over Plaintiffs' state law claims of breach of contract and fraud pursuant to 28 U.S.C. § 1367 because the Court finds these claims to be so related as to form part of the same case and controversy.

evidence of any intent to discriminate on account of race and because any agreement with Black Agents & Brokers Agency was terminable at will, Defendants' motions are GRANTED.

BACKGROUND

Defendant Near North Insurance Brokerage, Inc. ("NNIB") is an insurance brokerage firm located in Chicago, Illinois. Defendants Trump Indiana, Inc., Majestic Star Casino, LLC, and Buffington Harbor (collectively the "Riverboats") are involved in the operation of casino boats on Lake Michigan in Gary, Indiana. Plaintiff Black Agents & Brokers Agency, Inc. ("BABA"), is an alliance of insurance agents and brokers owned by shareholders, Milton Ward, Melvin D. Ward, Roosevelt Haywood, Sr., and Roosevelt Haywood, III all of whom are African-American. Roosevelt Haywood, III is not a party to this action and apparently has resigned from BABA, Inc.

In 1995, a representative of Near North Insurance Brokerage ("NNIB"), Tim Gallagher, contacted BABA because NNIB was attempting to write insurance for the Riverboats, and it wanted a minority co-broker to help them secure the Riverboat business. In early 1996, an original co-broker arrangement was formed in relation to insurance provided to Buffington Harbor during the construction phase of Buffington Harbor. BABA was to receive thirty percent of the commission from this insurance business and eventually received a check from NNIB for $6,269.40 in March 1996.

During this time, the continuation and expansion of this co-broker relationship was discussed in correspondence between BABA and NNIB and again when the principals of those two entities met in July 1996. The parties discussed the form of the relationship and the compensation arrangement. BABA asked for sixty percent of the commission but NNIB was

unwilling to agree to such terms. In response, NNIB sent a document to BABA indicating that it was willing to pay BABA a flat fee of $45,000 annually. Thereafter, a Consulting Agreement was reached concerning insurance to be sold to the Riverboats.

The Agreement signed between BABA and NNIB provided as follows:

CONSULTATION AGREEMENT BETWEEN
NEAR NORTH INSURANCE BROKERAGE, INC. ("NNIB")
AND
BLACK AGENTS AND BROKERS AGENCY, INC. ("BABA")
Made and entered into on July 15, 1996

Whereas, NNIB seeks to receive professional and consulting services from BABA in order to develop its clientele and BABA agrees to provide such services for monetary consideration.

In consideration of the premises, terms and conditions herein, the parties agree as follows:

SERVICES TO BE RENDERED BY BABA

1. Promote and support the relationship between NNIB and the Trump Casino, the Majestic Star Casino, Buffington Harbor Riverboats and the City of Gary.

2. Schedule meetings between the Trump, Majestic Star and Buffington Harbor representatives and NNIB representatives on a periodic basis.

3. Collect all information regarding clients and prospective clients as requested by NNIB.

4. Assume other appropriate consulting responsibilities as agreed upon by NNIB.

PAYMENT TERMS

In return for rendering the above services, BABA will receive a service fee of $45,000 for one year. This fee may be reviewed and revised in the event additional business is sold and such modifications to the payment terms shall be included in an appendix which will be attached and incorporated herein.

GENERAL TERMS

The term of this agreement is one year and may be renewed for additional yearly periods or modified only upon the signed, written agreement of both parties. This agreement may terminate prior to the expiration of the term by sixty (60) days written notice from either party to the other.

The parties agree that BABA will act as an independent contractor for NNIB and that no agency relationship exists between the parties.

The parties acknowledge that this agreement is their full and complete agreement and agree that this agreement shall be governed by the laws of Indiana.

This was a one year agreement and there was never any other written agreement between the parties. However, the relationship between NNIB and BABA continued beyond the one year term called for in the Agreement, although with some alterations. For example, the yearly flat fee paid to BABA was unilaterally reduced by NNIB to $40,000 in 1998, and the payment method was changed in 1999 from annual payments to quarterly payments.

After the Consulting Agreement was signed between NNIB and BABA, both entities made a joint presentation to the Riverboats in an effort to procure the insurance business. BABA shareholder, Roosevelt Haywood, III, assisted in the presentation and became the BABA contact person. After the presentation, the Riverboats purchased insurance.

It is undisputed that NNIB's chances of obtaining the insurance business with the Riverboats was greatly enhanced by having a minority owned business, BABA, as its co-broker. Indeed, pursuant to Indiana Code § 4-33-14-1 *et seq.*, the Riverboats had an affirmative duty to grant a certain percentage of their contracts to minority owned businesses. The Riverboats then had to file annual reports with the Indiana Gaming Commission certifying the total dollar value of contracts awarded to minority businesses. *See* Ind. Code § 4-33-14-5(b).

According to an arrangement between NNIB and the Riverboats, in order to collect premiums on the insurance policy, NNIB sent invoices directly to Trump, Majestic Star and Buffington Harbor in BABA's name. Thereafter, Trump, Majestic Star, and Buffington Harbor telephoned BABA to inform BABA that they had received the invoice and that a check was ready. The check was made payable to BABA. On behalf of NNIB, and pursuant to the agreement between NNIB and BABA, a representative of BABA would go to the Riverboats and endorse the checks over to NNIB. After BABA signed over the checks, the Riverboats would

then deliver the endorsed check to NNIB. BABA never retained any of the checks made out to them by the Riverboats nor were they ever paid directly for any services by the Riverboats. All of BABA's fees were paid by NNIB. Thus, it is undisputed that BABA was not writing any insurance for the Riverboats and only served in a co-broker capacity with NNIB. In short, beyond the initial presentation and periodically going to the Riverboats to endorse checks as described above, BABA provided no actual services to the Riverboats.

In early 2000, one of BABA's principals, Roosevelt Haywood, III, resigned from BABA. At the same time, a dispute arose between Haywood, III and BABA because Haywood, III apparently attempted to take many of BABA's accounts with him. Later in May 2000, NNIB discontinued working with BABA and ceased sending them any checks.

BABA brought this action claiming that, by terminating BABA, NNIB and the Riverboats had discriminated against them on the basis of race in violation of 42 U.S.C. § 1981. They have also brought claims for breach of contract and for fraud. The matter is now before the Court on Defendants' motions for summary judgment and a motion for judgment on the pleadings.

DISCUSSION

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The party seeking summary judgment carries the initial burden of demonstrating an absence of evidence to support the position of the non-moving party. *Doe v. R.R. Donnelley & Sons, Co.*, 42 F.3d 439, 443 (7th Cir. 1994). The non-moving party must then set forth specific

facts showing there is a genuine issue of material fact and that the moving party is not entitled to judgment as a matter of law. *Anderson v. Liberty Lobby*, 477 U.S. 242, 252 (1986). A genuine dispute about a material fact exists only if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986).

In making this determination, the Court must draw every reasonable inference from the record in the light most favorable to the non-moving party. *Haefling v. United Parcel Serv., Inc.*, 169 F.3d 494, 497 (7th Cir. 1999). The non-moving party must support its contentions with admissible evidence and may not rest upon mere allegations in the pleadings or conclusory statements in affidavits. *Celotex*, 477 U.S. at 324. The plain language of Rule 56(c) mandates the entry of summary judgment against a party who fails to establish the existence of an element essential to its case and on which that party will bear the burden of proof at trial. The production of only a scintilla of evidence will not suffice to oppose a motion for summary judgment. *Anderson*, 477 U.S. at 252.

I. Claims of the BABA Shareholders

The captions of the Complaint and Amended Complaint indicate that Milton Ward, Melvin Ward and Roosevelt Haywood, Sr. are bringing this action in their capacity as shareholders and officers of BABA, Inc. All of the Defendants move for summary judgment on the grounds that shareholders have no claim, independent of the corporate entity, for breach of contract or for violation of 42 U.S.C. § 1981.

It is well established that a shareholder, even one of a closely held corporation, does not have standing to bring a claim to redress a breach of contract or an illegal act of discrimination

done to a corporation. *See, e.g., Carney v. Gen. Motors Corp.*, 23 F.3d 1154, 1157 (7th Cir. 1994); *Cooper v. Durham Sch. Servs.*, 2003 WL 22232833, at *2 (N.D. Ill. Sep. 22, 2003); *Triad Assoc., Inc. v. Chicago Hous. Auth.*, 1992 WL 349655, at *6 (N.D. Ill. Nov. 13, 1992); *see also Gersman v. Group Health Ass'n, Inc.*, 931 F.2d 1565, 1569 (D.C. Cir. 1991), *vacated on other grounds*, 112 S. Ct. 960 (1992). Accordingly, the Court finds that the individual shareholders of BABA, including Milton Ward, Melvin Ward and Roosevelt Haywood, Sr. have no standing to redress any alleged discrimination or breach of contract suffered by BABA, Inc.

Additionally, Plaintiffs failed to address Defendants' argument that they lack standing to bring a lawsuit as individuals, and the Court now finds that Plaintiffs have abandoned these claims in their individual capacities. *Robyns v. Reliance Std. Life Ins. Co.*, 130 F.3d 1231, 1237 (7th Cir. 1997) (noting that a party opposing a summary judgment motion must inform the trial judge of the reasons, legal or factual, why summary judgment should not be entered and the failure to so inform the court waives right to argue the issue on appeal).

II. BABA's Breach of Contract Claims

A. The Riverboats

Defendants Trump, Majestic Star, and Buffington Harbor move for summary judgment on BABA's claims for breach of contract on the grounds that they were not parties to any contract with BABA. The Court agrees.

It is well settled that to recover for breach of contract, a plaintiff must prove that: (1) a valid contract existed between the parties; (2) the defendant failed to perform its part of the contract; and (3) the plaintiff was damaged by the defendant's breach. *Strong v. Commercial Carpet Co., Inc.*, 322 N.E.2d 387, 391 (Ind. Ct. App. 1975). A party breaches a contract when it

fails to perform all the obligations which it has agreed to undertake. *Worrell v. WLT Corp.*, 653 N.E.2d 1054, 1057 (Ind. Ct. App. 1995).

Thus, for BABA's claim against the Riverboats to succeed, BABA must first prove that "a valid contract existed between the parties." *Strong*, 322 N.E.2d at 391. "A person typically cannot be held liable for breach of contract unless it is shown that she was a party to the contract." *DiMizio v. Romo*, 756 N.E.2d 1018, 1021-22 (Ind. Ct. App. 2001). It is undisputed that in response to the Riverboats motion for summary judgment, BABA has failed to produce any evidence of an agreement between BABA and the Riverboats.

Indiana courts do, however, hold that a contract may be inferred from the conduct of the parties. *See, e.g., Indianapolis v. Twin Lakes Enters., Inc.*, 568 N.E.2d 1073, 1078 (Ind. Ct. App. 1991) (noting that implied in fact contract arises where circumstances show a mutual intention to contract). However, even without a writing, BABA must still show that there was a meeting of the minds with respect to the terms of the agreement and that the parties intended to be bound by the agreement. *See DiMizio*, 756 N.E.2d at 1022 ("A mutual assent or a meeting of the minds on all essential elements or terms must exist in order to form a binding contract"); *Homer v. Burman*, 743 N.E.2d 1144, 1146-47 (Ind. Ct. App. 2001). *See also Wolvos v. Meyer*, 668 N.E.2d 671, 675 (Ind. 1996) (noting that enforcement of a writing which is incomplete or ambiguous creates the substantial danger that the court will enforce something neither party intended). While the intent of the parties to form a legally enforceable contract is ordinarily a question of fact, it becomes a question of law where reasonable minds cannot disagree. *See Indianapolis*, 568 N.E.2d at 1079.

In the face of summary judgment, BABA has failed to set forth specific facts from which the Court could find any enforceable agreement between the Riverboats and BABA. At most, BABA repeats the vague and conclusory allegations of the Complaint. In essence, these allegations amount to the fact that pursuant to an agreement between NNIB and BABA, those two parties made a presentation to sell insurance to the Riverboats, that the Riverboats secured insurance as a result of these presentations and that NNIB and BABA were to split the brokerage commissions paid by the Riverboats pursuant to their own agreement. Yet even granting BABA every reasonable inference, there is still no evidence of any enforceable agreement between any of the Riverboats and BABA. Melvin Ward's deposition testimony is telling on this point. Asked to identify any evidence of an agreement between the Riverboats and BABA, Ward was only able to point to the checks for the insurance premiums that were made out in BABA's name by the Riverboats and then signed over in their entirety by BABA to NNIB. Indeed, the only terms of an agreement BABA is able to point to with any evidentiary support come from the Consulting Agreement entered into by BABA and NNIB, and not the Riverboats, back in 1996. BABA has not presented the Court with any evidence of what the essential terms of the agreement between BABA and the Riverboats were, let alone any evidence that the Riverboats and BABA intended to be contractually bound by those terms.

In short, BABA presents the Court with no evidence of an enforceable agreement between the Riverboats and BABA. Accordingly, because no enforceable contract existed between BABA and the Riverboats, BABA's claim of breach of contract against the Riverboats fails as a matter of law.

B. NNIB

Defendant NNIB also moves for summary judgment on BABA's claim for breach of contract against NNIB on the grounds that the Consulting Agreement between BABA and NNIB ended by its own terms in July 1997 and any continuation of the relationship beyond 1997 was terminable at will. The Court agrees.

The Consulting Agreement between BABA and NNIB was entered into on July 15, 1996. The Agreement provided that BABA shall promote and support the relationship between NNIB and the Riverboats and the City of Gary; schedule meetings between the Riverboats and NNIB on a periodic basis; collect information regarding clients and prospective clients as requested by NNIB; and assume other consulting responsibilities as agreed upon by NNIB. For these services, BABA was to receive a service fee of $45,000 for one year.

The Agreement between BABA and NNIB further provided that:

> The term of this Agreement is one (1) year and may be renewed for additional periods or modified only upon the signed, written agreement of both parties. This agreement may terminate prior to the expiration of the term by sixty (60) days written notice from either party to the other.

While NNIB and BABA continued their relationship after July 15, 1997, no other written agreement was entered into between NNIB and BABA. In 1998, the fee NNIB paid to BABA was reduced to $40,000. In 1999, NNIB began issuing payments to BABA quarterly instead of annually.

The primary goal in construing a contract is to ascertain and give effect to the parties' mutual intent. *See, e.g., Matter of Forum Group, Inc.*, 82 F.3d 159, 163 (7th Cir. 1996); *Perfect v. McAndrew*, 798 N.E.2d 470, 489 (Ind. Ct. App. 2003). The Court finds that by its clear and unambiguous language, the Consulting Agreement between BABA and NNIB expired in July

1997, and could only be renewed upon a signed, written agreement between BABA and NNIB. In short, the intent of the parties, as embodied in the Consulting Agreement, demonstrates that the terms of the Agreement would only apply for one year after which the Agreement would expire.

Of course, as both parties point out, a contract may be established or modified by the conduct of the parties without any words expressed in writing, if the conduct of the parties indicates an intent to agree.[2] *See Indianapolis*, 568 N.E.2d at 1078; *see also Skweres v. Diamond Craft Co.*, 512 N.E.2d 217, 220-221 (Ind. Ct. App. 1987) (noting that modification of a contract can be implied from the conduct of the parties). BABA contends that the Consulting Agreement was renewed for additional one year periods because the parties had continued to abide by its terms after the expiration of the original agreement in July 1997. As the Seventh Circuit has noted, when a contract expires it does not automatically renew "simply because the parties continued to do business governed by its terms." *Consol. Bearings Co. v. Ehret-Krohn Corp.*, 913 F.2d 1224, 1230 (7th Cir. 1990). In this case, the Court finds that the continuation of the relationship alone does not establish a renewal of the Consulting Agreement where the language chosen by the parties so clearly indicated an intent that the Agreement would expire after one year.

[2] It is also possible that NNIB and BABA could have modified (and renewed) the contract orally despite the language of the Consulting Agreement. *See, e.g., TRW, Inc. v. Fox Dev. Corp.*, 604 N.E.2d 626 (Ind. Ct. App. 1992). However, BABA has not presented the Court with any evidence of an oral agreement to continue to be bound by the terms of the original Consulting Agreement.

While the Court finds no Indiana law addressing these exact circumstances, courts of other jurisdictions have.[3] For example, in *Auerbach M.D. v. Kantor-Curley Pediatric Associates, P.C.*, 2004 WL 870702 (E.D. Pa. March 22, 2004), the parties to an employment contract continued to operate under the terms of the contract after the contract expired. The court held that because the contract had an express, unambiguous term requiring that any further modifications be in writing, the employer was not bound to a renewed term of the contract. *Id.* at *4-5; *see also Korody Marine Corp. v. Minerals & Chemicals Philipp Corp.*, 300 F.2d 124 (2d Cir. 1962) (fact that parties continued to deal under some sort of informal arrangement does not mean that the terms of the expired formal contract continued to apply); *Anderson v. Waco Scaffold & Equip. Co., Inc.*, 485 P.2d 1091, 1094 (Or. 1971) (fact that parties continued to abide by terms after expiration of the original agreement did not establish renewal where agreement provided only for renewal by mutual agreement and there was no evidence that parties intended to extend the contract for another period); *Corr v. Hoffman*, 256 N.Y. 254, 272-73 (N.Y. 1931) (holding that continuance of a partnership by consent of the parties, though without express contract, did not evidence an intention to renew the partnership contract for another fixed term). The Court finds the reasoning of these decisions persuasive.

At most, the evidence presented by BABA suggests that there was an informal agreement to continue the relationship, but under terms different from the original Consulting Agreement. This is important because "[g]eneral principles of contract law teach us that when a contract

[3] Where the Indiana Supreme Court has not directly addressed the issue, this Court must predict how the Indiana Supreme Court would decide the case. *See, e.g., Klunk v. County of St. Joseph*, 170 F.3d 772, 777 (7th Cir. 1999); *McGeshick v. Chouciar*, 72 F.3d 62, 65 (7th Cir. 1995).

lapses but the parties to the contract continue to act as if they are performing under a contract, the material terms of the prior contract will survive intact *unless either one of the parties clearly and manifestly indicates, through words or through conduct, that it no longer wishes to continue to be bound.*" *Deutsche Fin. Servs. Corp. v. BCS, Inc.*, 299 F.3d 692, 697 (8th Cir. 2002) (emphasis in original) (internal quotations omitted).

In this case, NNIB unilaterally reduced the fee they were paying to BABA from $45,000 to $40,000 in 1998.[4] Then in 1999, NNIB unilaterally decided to pay BABA on a quarterly basis instead of on an annual basis. This is clear proof that the parties did not view themselves bound by the terms of the expired contract. BABA has not presented the Court with any evidence from which a reasonable jury could infer that the parties intended to be bound by the very terms of the original Consulting Agreement, including additional binding one year terms.

Thus, even if the continued relationship and payment by NNIB to BABA is considered a contract, it is one without a definite term. Indiana courts hold that a contract without a definite term is terminable at will by either party. *Rogier v. American Testing & Eng'g Corp.*, 734 N.E.2d 606, 616 (Ind. Ct. App. 2000) (contract which is silent as to term or which lasts indefinitely is terminable at will); *House of Crane, Inc. v. Fendrich, Inc.*, 256 N.E.2d 578 (Ind. Ct. App. 1970) (citing *Bell v. Speed Queen*, 407 F.2d 1022 (7th Cir. 1969)). Such a contract is enforceable until terminated, but there is no liability for the termination itself. *Id.*

[4] It appears that BABA also complains that NNIB breached the agreement by this reduction of the fee paid by NNIB to BABA. Yet, as BABA itself points out, the parties to a contract may modify that contract by their conduct. While the original agreement between NNIB and BABA provided that NNIB would pay BABA $45,000 for its services, NNIB reduced this payment to $40,000 in 1998. BABA readily accepted the lower fee and without evidence to the contrary, the Court can only conclude that BABA agreed to the modification.

Accordingly, the Court finds that without a termination date, any agreement between BABA and NNIB was terminable at will and therefore there was no breach by NNIB when it chose to discontinue its relationship with BABA in the summer of 2000. Thus, BABA's claim against NNIB for breach of contract fails as a matter of law as well.

III. BABA's Claims under Section 1981

All of the Defendants further move for summary judgment on BABA's claims under Section 1981 because BABA cannot show that it was discriminated against on account of race. The Court agrees.

Section 1981 "bars all racial discrimination with respect to making and enforcing contracts." *Gonzalez v. Ingersoll Milling Mach. Co.*, 133 F. 3d 1025, 1034 (7th Cir. 1998). To prevail on a claim pursuant to Section 1981 outside of the employment context, a plaintiff must demonstrate that: (1) he or she is in the class of persons protected by the statute; (2) the defendant had an intent to discriminate on the basis of race; and (3) the discrimination concerned the making or enforcing of a contract.[5] *See, e.g., Morris v. Office Max, Inc.,* 89 F.3d 411, 413 (7th Cir. 1996). Neither the first nor the third elements are in dispute here; BABA is clearly within the class that is protected by Section 1981, and if there is discrimination, it plainly relates to the making or enforcing of a contract. Therefore, the only issue is whether BABA has presented evidence that the Defendants had an intent to discriminate on the basis of race.

BABA suggests that the relationship between NNIB, the Riverboats and BABA was

[5] BABA's claim under Section 1981 against the Riverboats fails for the additional reason that, as discussed above, there was no contract between the Riverboats and BABA and thus the Riverboats cannot be liable under Section 1981. *See Gonzalez,* 133 F. 3d at 1034 (noting that to bring a Section 1981 claim there must at least be a contract).

always motivated by racial considerations and thus the termination of the relationship must also have been motivated by race. Recounting how the relationship was originally formed, BABA offers evidence that NNIB recruited BABA as a partner in brokering insurance for the Riverboats because of BABA's status as a minority business enterprise. BABA's status as a minority business enterprise was then marketed to the Riverboats so they could meet minority business purchasing goals established by the Indiana Gaming Commission. BABA also offers that the race of the principals of BABA, is itself evidence of the Defendants' intent to discriminate.

The Court finds that nothing that BABA has offered as evidence supports a reasonable inference that the Defendants intended to discriminate because of BABA's race when the relationship with BABA was terminated. Just because BABA may have had an advantage in procuring the contract (due to its minority status) does not prove that they were discriminated against when the contract was not renewed. In other words, while NNIB may have been attracted to BABA in the first place because of their status as a minority business enterprise, this is simply not probative evidence that the relationship ended due to discriminatory intent. To find otherwise would, in essence, mean that anyone who hires a company pursuant to government mandated minority business goals would not be able to terminate that relationship without subjecting themselves to liability under § 1981. In sum, there must be some evidence that the termination was motivated by race. Here there is none.

Equally unavailing is the argument that just because BABA was owned by African-Americans is in itself evidence of an intent to discriminate. The case of *Frasier v. Doubleday Co., Inc.*, 587 F. Supp. 1284 (S.D.N.Y. 1984) is illustrative. The plaintiff in *Frasier* had entered

into a book contract with a publisher and after disagreements under the contract arose, filed suit against the publisher alleging breach of contract and discrimination under Section 1981. In assessing whether the plaintiff had presented evidence of a racially discriminatory motivation, the court concluded that "the fact that plaintiffs are black, which in essence constitutes the entirety of the plaintiff's case on the racial discrimination claim, does not lead to an inference that defendant's conduct was racially motivated." *Id.* at 1287.

Ultimately, BABA has presented the Court with no more than a suspicion that NNIB discriminated against it because its owners were African-American. BABA is obligated to come forth with some evidence of an intent to discriminate when NNIB terminated the agreement with BABA to survive summary judgment. Accordingly, because BABA has not presented the Court with any evidence of an intent to discriminate on account of race when the at will agreement with BABA was terminated, BABA's claims under Section 1981 against NNIB and the Riverboats fail as a matter of law.

As an aside, it is worth mentioning that Courts have struggled with the precise framework by which a plaintiff may show intentional discrimination unrelated to an employment contract in the absence of "direct" evidence of an intent to discriminate. *See Sanghvi v. St. Catherine Hosp., Inc.*, 258 F.3d 570, 577 (7th Cir. 2001) (noting the "lack of a well developed list of elements for a prima facie § 1981 case outside of the employment context"). Some courts have attempted to conform the *McDonnell Douglas* "indirect" *prima facie* framework to non-employment related Section 1981 claims. *See, e.g., O'Neill v. Gourmet Sys. of Minnesota, Inc.*, 213 F. Supp. 2d 1012 (W.D. Wis. 2002); *Batteast Constr. Co., Inc. v. Henry Co. Bd. Of Comm'rs*, 194 F. Supp. 2d 828, 834 (S.D. Ind. 2002); *Christian v. Wal-Mart Stores, Inc.*, 252

F.3d 862 (6th Cir. 2001). Other courts have applied the *Morris* three part test as the measuring stick for determining whether a plaintiff has established a *prima facie* case. *See Hampton v. Dillard Dept. Stores, Inc.*, 247 F.3d 1091, 1101-02 (10th Cir. 2001); *Bobbitt v. Rage, Inc.*, 19 F. Supp. 2d 512, 517 (W.D.N.C. 1998).

In either event, the Court concludes that while a plaintiff needs some leeway in attempting to prove intentional discrimination, he has to produce at least some evidence, following the *McDonnell Douglas* framework or not, from which a jury could infer that the plaintiff was discriminated against on the basis of an improper motive. *See Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 256 (1981) (noting that "the allocation of burdens and the creation of a presumption by the establishment of a *prima facie* case is intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination"). Thus, regardless of the method employed, BABA is ultimately responsible for coming forward with some evidence beyond the allegations of the Complaint from which it can reasonably be inferred that a contract with the Defendants was terminated because of race. It has failed to do so and summary judgment is therefore appropriate.

IV. BABA's Claims of Fraud Against NNIB and the Riverboats

A. NNIB

NNIB has also moved for summary judgment on BABA's claim of fraud. In response, BABA argues that "Plaintiffs' claims fall into two categories: first, BABA claims that NNIB breached an agreement entered into in 1996 which continued in force until 2003; second, BABA claims that NNIB discriminated against it in violation of 42 U.S.C. § 1981 with respect to making and enforcing contracts." Evidently, BABA concedes that it has no fraud claim against

NNIB. Therefore, because BABA has not addressed NNIB's argument that they are entitled to judgment as a matter of law on BABA's claim for fraud, the Court finds that BABA has abandoned its claim of fraud as it relates to NNIB. *See Robyns*, 130 F.3d at 1237 (noting that a party who fails to respond waives issue for appeal).

B. The Riverboats

Pursuant to Indiana Code § 4-33-14-1 *et seq.*, the Riverboats had an affirmative duty to grant a certain percentage of their contracts to minority owned businesses. The Riverboats then had to file annual reports with the Indiana Gaming Commission certifying the total dollar value of contracts awarded to minority businesses. *See* Ind. Code § 4-33-14-5(b). In its First Amended Complaint, BABA claims it was defrauded because the Riverboats lied to the Indiana Gaming Commission in its annual reports. (*See* First Amended Complaint, Claim Four). In particular, BABA alleges that NNIB fraudulently reported to the Gaming Commission that BABA had received hundreds of thousands of dollars in insurance premium revenue when in fact the money went to NNIB, and BABA received only a small portion of it. *Id*.

The Riverboats have moved for partial judgment on the pleadings on BABA's claim of fraud. As a general matter, a motion for judgment on the pleadings is governed by the same standard that applies to dismissals under Fed. R. Civ. P. 12(b)(6) for failure to state a claim on which relief can be granted. *See Gustafson v. Jones*, 117 F.3d 1015, 1017 (7th Cir. 1997). Thus, judgment may not be granted against the non-moving party "unless it appears beyond a doubt that the [non-moving party] cannot prove any facts that would support his claim for relief." *Id*. (internal quotation marks omitted). The facts alleged in the complaint are taken in the light most favorable to the non-moving party. *R.J. Gorman Derailment Serv., LLC v. Int'l Union of*

Operating Eng'rs, 335 F.3d 643, 647 (7th Cir. 2003). However, both Fed. R. Civ. P. 12(b)(6) and Fed. R. Civ. P. 12(c) also provide that if, on a motion under the rule, matters outside the pleadings are presented to and not excluded by the court, then the motion must be converted to one for summary judgment under Fed. R. Civ. P. 56, and "all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Fed. R. Civ. P. 12(b) & (c). *Id*.; *See also Church v. Gen. Motors Corp.*, 74 F.3d 795, 798 (7th Cir. 1996).

The Riverboats submit that BABA has no standing to bring a claim for fraud where the alleged representations which are the focus of BABA's claim were made to the State of Indiana and not to BABA and as a result BABA suffered no injury in fact as a result of these representations. The Court agrees.

The Supreme Court has held the question of standing is in essence, "whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). "This inquiry involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." *Id.* When considering whether a party satisfies the constitutional requirement of standing, the court must determine that "the plaintiff himself has suffered 'some threatened or actual injury resulting from the putatively illegal action.'" *Id.* In other words, to meet the constitutional element of standing, the plaintiff must allege an actual "case or controversy" within the meaning of Article III. *Id.*; *see also Sierakowski v. Ryan*, 223 F.3d 440, 443 (7th Cir. 2000) (plaintiff must establish that he has sustained or is immediately in danger of sustaining some direct injury); *Gonzales v. N. Township*, 4 F.3d 1412, 1415 (7th Cir. 1993) (only a plaintiff with a personal stake in a case or controversy has standing to bring a lawsuit).

Recently, the Seventh Circuit described the required elements of standing as follows: "(i) an injury in fact, which is an invasion of a legally protected interest that is concrete and particularized and, thus, actual or imminent, not conjectural or hypothetical; (ii) a causal relation between the injury and the challenged conduct, such that the injury can be fairly traced to the challenged action of the defendant; and (iii) a likelihood that the injury will be redressed by a favorable decision." *Reid L. v. Ill. State Bd. of Educ.*, 358 F.3d 511, 515 (7th Cir. 2004) (quoting *Lee v. City of Chicago*, 330 F.3d 456, 468 (7th Cir. 2003)); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). BABA as the party invoking federal jurisdiction, bears the burden of establishing standing. *Perry v. Vill. of Arlington Heights*, 186 F.3d 826, 829 (7th Cir. 1999).

In Claim Four of the Complaint, BABA fails to include any allegation of an injury in fact that it suffered. It is apparent from the record, that the Riverboats included the total amounts of the premiums they paid to NNIB for insurance in their representations to the State of Indiana concerning business done with minority owned enterprises. The only injury that can be discerned from the Riverboats' over-representation to the State of Indiana of the amounts paid to a minority owned business is to the State of Indiana itself and not BABA. BABA suggests that the misrepresentations to the State of Indiana were inherently injurious to BABA. In particular, BABA claims that it was injured because Indiana's Department of Administration, responsible for certifying BABA's status as a minority business enterprise and the Riverboats' compliance with minority business goals, contacted BABA to verify the amounts paid by the Riverboats. In short, BABA claims that the Riverboats' alleged misrepresentations to the State of Indiana "brought scrutiny upon BABA by a governmental agency." The Court finds that this scrutiny by

a governmental agency is hardly an injury in fact that gives standing to BABA to bring a claim of fraud based on the Riverboats' representations to the State of Indiana.

In addition to the constitutional limitations on standing, judicially imposed prudential considerations caution that even though a plaintiff has established an actual case or controversy, it would be imprudent for the court to exercise power. *Warth*, 422 U.S. at 499. One of these prudential considerations is that a "plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Franchise Tax Bd. Of California v. Alcan Aluminum Ltd.*, 493 U.S. 331, 336 (1990) (citing *Warth*, 422 U.S. at 499); *see also Massey v. Helman*, 196 F.3d 727, 740-741 (7th Cir. 1999) ("Courts recognize a general rule against allowing a litigant to seek vindication of the rights of a third party not before the court...when determining whether to fashion an exception to this general rule, courts consider two facts: (1) the relationship of the litigant to the person whose right he seeks to assert; and (2) the ability of the third party to assert his own right.").

In this case, even if the Court were convinced that BABA meets the constitutional requirements for standing, prudential considerations persuade the Court that BABA lacks standing to bring a claim based upon the Riverboats' representations to the State of Indiana. If BABA has alleged an injury in this case, the injury is one to the State of Indiana and its citizens and not to BABA. Under Indiana law, the recipients of gaming licenses are required to conduct certain amounts of business with minority owned business enterprises. *See generally* Ind. Code § 4-33-14. Further, the statutory scheme provides that the Gaming Commission "shall be responsible for enforcing" the minority spending requirements. Ind. Admin. Code tit. 68, r. 3-3-7(a). Thus, assuming the Riverboats in fact misrepresented the amount of business they were

conducting with minority owned enterprises, the injury caused by such misrepresentations can and should be addressed only by the Gaming Commission and not a minority owned enterprise such as BABA.

Accordingly, because BABA has suffered no injury in fact, the Court finds that BABA has no standing to bring a claim of fraud in federal court for any representations made by the Riverboats to the State of Indiana. Further, even if there was an injury, that injury occurred to the State of Indiana and not BABA and thus it would be imprudent for the Court to exercise its power. Therefore, judgment on the pleadings must be granted for BABA's claim of fraud against the Riverboats.

Finally, even if the Court did not grant judgment on the pleadings on BABA's claim of fraud for lack of standing, BABA could not survive summary judgment, in any event. To make out an action for actual fraud, BABA must show: (i) material misrepresentation of past or existing facts by the party to be charged; (ii) which was false; (iii) which was made with knowledge or reckless ignorance of the falseness; (iv) was relied upon by the complaining party; and (v) proximately caused the complaining party injury. *Rice v. Strunk*, 670 N.E.2d 1280, 1289 (Ind. 1996). Moreover, for a plaintiff "to recover under a fraud theory, it must show that it had a right to rely on the defendants' misrepresentations and that it did in fact rely on the misrepresentations to its detriment." *Scott v. Bodor, Inc.*, 571 N.E.2d 313, 321 (Ind. Ct. App. 1991).

There is simply no evidence that BABA detrimentally relied upon the Riverboats' representations made to the Indiana Gaming Commission as to the amount of minority business that they were doing. Moreover, as discussed above, there is no cognizable injury to BABA as a

result of the Riverboats' alleged misrepresentations. Accordingly, even if BABA had standing to bring a claim of fraud based upon the Riverboats' misrepresentations to the State of Indiana, BABA's claim of fraud would still fail as a matter of law.

CONCLUSION

The Court finds that the individual shareholders have no independent claim for breach of contract or pursuant to 42 U.S.C. § 1981 for injuries suffered by BABA, Inc. Further, BABA's claim of breach of contract against the Riverboats fails as a matter of law where BABA has presented the Court with no evidence of any enforceable agreement. BABA's claim of breach of contract against NNIB fails as a matter of law where any agreement between NNIB and BABA was terminable at will. BABA's claim of discrimination pursuant to Section 1981 against NNIB and the Riverboats fail as a matter of law because BABA has presented no evidence of any intent to discriminate on account of race. The Court also finds that BABA has abandoned its claim of fraud against NNIB. Finally, the Court finds that BABA lacks standing to bring a claim of fraud against the Riverboats based upon any representations the Riverboats made to the State of Indiana. Accordingly, for the reasons stated herein, the Court **GRANTS** the motions for summary judgment filed by NNIB and the Riverboats in their entirety (Docket Nos. 39 & 45) as well as the motion for partial judgment on the pleadings filed by the Riverboats (Docket No. 48).

The Clerk is directed to enter **FINAL JUDGMENT** stating "Plaintiffs shall take nothing by way of their Complaint." The Clerk is further directed to treat this matter as **TERMINATED** and all further settings are hereby **VACATED**.

SO ORDERED.

Enter: June 7, 2004

S/ Philip P. Simon
Philip P. Simon, Judge
United States District Court